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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-530

JOHN R. CHERUP ET AL., Petitioners,

v.

PITTSBURGH PLATE GLASS COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

We do not agree with Petitioners' view that the question presented here is the resolution of apparent conflict of the decision in this case (and the two recent decisions of the Courts of Appeal on which it is based) with earlier decisions of this Court. In our view, there is no conflict.

It seems to us that the question presented at this point is:

Did the Court of Appeals commit error in affirming the decision of the District Court, which held that, under its findings of facts from the undisputed evidence and according to the decided cases, Petitioners were not entitled to recover.

THE DECISION HERE IS NOT IN CONFLICT WITH THOSE OF OTHER COURTS OF APPEAL

The decision rendered in this case is not in conflict with the decisions of other Courts of Appeal. The contrary is true. It is in complete accord with decisions on the same matter by the Courts of Appeals of the Fifth and Sixth Circuits and with a similar decision by the District Court in the Third Circuit in a case which did not reach the Court of Appeals.

The decision in the Fifth Circuit is that of *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283 (C.A. 5, 1969), cert. denied 397 U.S. 1040, where, as indicated in the citation, it reached this Court where certiorari was denied. The facts of that case are practically identical with those of that now before the Court.

The decision from the Sixth Circuit is that of *Jackson v. Air Reduction Co.*, 402 F.2d 521 (C.A. 6, 1968) and that from the Third Circuit is *Battery Workers' Union v. Electric Storage Battery Co.*, 78 F.Supp. 947 (E.D. Pa. 1948). The facts in the *Battery* case are also strikingly similar to those before the Court.

We shall discuss these cases in detail later in this brief.

STATEMENT OF FACTS

We believe it appropriate to supplement the statement of facts in Petitioners' brief.

The Respondent's plant has been in operation since 1943, and since 1944 it has been continuously unionized by International Chemical Workers' Local Union No. 45 under a series of written contracts. Throughout all of this time, the problem of relief of workers at shift time has existed, yet no provision has ever been made or sought in the labor contracts and no claim was ever made that the time at the change of shifts for which recovery is now sought constituted "hours worked" until the institution of this case.

Respondent has never required its employees to report for work at any fixed time prior to the start of their shift. All it has required is that they be at their places of work in time to replace the employees going off. However, for personal reasons, some of the employees chose to arrive considerably earlier than was necessary or required.

For several years, before the institution of this case, Respondent permitted employees to clock in 25 minutes before the time the work was to begin. If an employee wished, he could enter the plant as much as 25 minutes before he was scheduled to begin work but he was under no obligation to do so. After he entered the plant, he could use his time as he wished and he did not have to relieve a fellow employee until the time scheduled to begin work. In practice, however, employees usually relieved each other a few minutes before the hour of their shift and they would in turn be re-

lieved by approximately the same amount of time at the close of the shift. Petitioners' brief states that relief was made at least 15 minutes before the hour and usually earlier (Petition page 4) but the reference there made to the testimony does not support that statement.

The employee who was being relieved was required by Respondent to not clock out until the time that his shift ended but he did not have to remain in his place of work until that time and could leave it as soon as his replacement took over. This procedure went on for years with no claim ever being made by the men or the union that some of this preliminary time should be considered as hours worked. Although having provisions in their labor contracts for the settlement of grievances, no grievance was ever made by anyone in connection with that situation.

Examinations at the plant had been made from time to time by the Wage & Hour Division of the Department of Labor (R.409)*, but there was no criticism of the relieving procedure. It was not until 1965 that an examination was made and a question raised that some of this preliminary time might possibly be considered as hours worked. The examiner suggested that a change be made in one of two ways, either not permit relief until the start of the shift or cut the clocking-in time to 20 minutes before the shift began and permit the employees to leave when relieved. Respondent adopted the second method, and on June 7, 1965, it changed the permissible

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*References are to the transcript of testimony in accord with the method adopted by Petitioners at page 4 of the petition.

hour to clock in to 20 minutes before shift time and permitted the employees to clock out after they were relieved (R. 405-409). This action then resulted.

No action of any kind was taken by the Secretary of Labor arising out of the situation. He is not a party to this action and did not participate in it at the trial level. When the case reached the Court of Appeals, he filed an *amicus* brief.

No one claims that Respondent required the employees to report or clock in at any given time prior to the beginning hour of the shift. The only requirement was that they be at the places of work ready to relieve on the hour. As a matter of practice, however, they usually relieved each other a few minutes before the hour and they in turn were relieved at the end of the shift by approximately the same length of time that they had given relief. On this point, the testimony is clear and undisputed (R. 30, 31, 49, 78, 80, 97, 113, 133, 149, 165, 183, 194, 212, 231, 246, 260, 277). After being relieved, they were free to get ready to go home, including changing clothes, showering or whatever they wanted to do until clocking out time on the hour.

The testimony is also undisputed that, irrespective of the time an employee relieved and that at which he was relieved, each was paid for eight hours of work on each shift and no one was ever docked in pay for failing to relieve early (R. 48, 96, 135, 149, 164, 181, 193, 195, 210, 230, 245, 246, 260, 276).

FINDINGS OF FACTS BY THE DISTRICT COURT

As already indicated the facts in the case are undisputed. Nevertheless, in arriving at his decision, the District Judge made findings of facts, and although not so labeled, they are found in his opinion. He found from the evidence that the following facts were true:

1) There was no plant requirement that employees clock in early or relieve early (4a).*

2) The times at which the employees did report were varied (4a).

3) Irrespective of when an employee clocked in, he was still paid for eight hours' work, and even though he reported on the hour, he still received eight hours of pay (4a).

4) Although it was claimed that there was some potential benefit to the Company from early relief, there were only a few instances in which this was actually utilized (8a).

5) Compensation for early check-in would be a proper subject to be included in the labor contract (9a).

6) There was no express contract provision and no custom or practice providing for compensation for the early relief (9a).

7) The changing of clothes by employees who were required to do so was accomplished during the eight hours for which employees were paid (10a).

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*References are to Appendix A of the Petition.

8) The changing of clothes where required took only a few minutes of time and was considered de minimis (10a).

It seems clear that the uncontroverted evidence, of itself, provided ample reason for the District Court to make these findings of facts; that it was correct in applying the law to those facts in arriving at its judgment; and that its judgment was sound. It is understandable that in this situation the Court of Appeals affirmed the judgment. There is no basis for it to do otherwise.

THE APPLICABLE DECISIONS

In holding that the employees were not entitled to recover and in dismissing the case, the District Court relied primarily upon three cases, namely: *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283 (C.A. 5, 1969); rehearing denied December 2, 1969; cert. denied 397 U.S. 1040 (1970); *Jackson v. Air Reduction Co.*, 402 F.2d 521 (C.A. 6, 1968); and *Battery Workers' Union v. Electric Storage Battery Co.*, 78 F.Supp. 947 (E.D. Pa. 1948). In so doing the Court stated:

> "The Court therefore adopts the rationale of the *Blum, Jackson* and *Battery Workers' Union* cases and finds that in the absence of an express contract provision, custom or practice providing for compensation, § 254 of the Portal-to-Portal Act precludes plaintiffs' recovery. This Court is not convinced that these three cases were erroneously decided or that they are materially distinguishable from this case." (9a)

The thrust of petitioner's argument here, as it was in the Court of Appeals and in the District Court, is that the *Blum*, *Jackson* and *Battery Workers' Union* cases were erroneously decided, that in particular *Blum* and *Jackson* are in conflict with other decisions of this Court. If the *Blum* case was decided in error or if it is in conflict with earlier decisions, this Court must have participated in the error and in the conflict for it denied certiorari (397 U.S. 1040). We believe those decisions were sound and that the District Court and the Court of Appeals were correct in relying on them in deciding and affirming the instant case.

The facts in the *Blum* and in the case now before the Court are strikingly similar. In *Blum*, the employees actually started working 30 minutes before their scheduled shift began, which means, of course, that they had to enter the plant and clock in earlier than that and then go to their places of work. They were relieved of their duties about 30 minutes before the scheduled ending of their shift but were not permitted to clock out until the hour. Thus, they were on the premises for a minimum of more than eight hours and thirty minutes but were paid for only eight hours.

In the instant case, the earliest the employees could clock in was 25 minutes before the starting hour and then they had to proceed to their places of work. The longest time they could be on the company's premises was eight hours and twenty-five minutes. There were many instances, of course, in which they were on the company's premises much less time than that. They relieved a few minutes before the hour began and were themselves relieved by the same time. The evidence on that is not disputed.

In neither of these cases were the employees required to give early relief and no one ever had his pay docked for not relieving early.

In neither case were grievances ever filed by any employees claiming compensation due to early relief and no such claims were ever made at bargaining sessions, although in the instant case the practice had prevailed for many years during which there were several bargaining sessions for union contracts. In both cases, claim was made that the time in question was compensable because the union contract provided that eight hours would be the employment work day and forty hours the work week, but in *Blum* as well as in the instant case, it was held that this did not meet the requirement of time being compensable under a written or non-written contract or custom or practice in effect covering the activity.

In *Blum*, an investigation by the Wage & Hour Division approved the practice of actually relieving 30 minutes early and not being permitted to clock out before the hour of the next shift. In the instant case examinations by the Wage & Hour Division had been made in the past with no criticism of the practice. It was not until an examination in 1965 that it was suggested that some of the preliminary time might possibly be considered as hours worked.

It would be difficult, indeed, to find two cases in which the facts are so similar as those in *Blum* and the instant case. Considering that the *Blum* case reached this Court where certiorari was denied, it would appear that it stands as authority on the issue here and that the District Court and the Court of Appeals were correct in following it.

The *Jackson* case also involved an early relieving shift practice. There the employees started working approximately 12 to 14 minutes before the hour of their shift but were not permitted to check out until the end of the shift, thus requiring them to be on the premises of the company for more than the scheduled hours of their shift. The Court of Appeals for the Sixth Circuit held that they were not entitled to compensation for the additional time. There, too, an investigation had been made by the Wage & Hour Division regarding the early reporting for work and no fault was found with the system. Also, as in the instant case, claim was made that by being required to remain on the premises the employees could be called out by the company in case of emergency and further it provided an opportunity for an exchange of information.

The *Battery Workers'* case is also strikingly similar to the instant case. There, employees came to the plant 20 to 30 minutes before the beginning of their shift, changed into a uniform, obtained a gun, received instructions and then relieved the employee on duty, usually about 15 minutes before the hour. They were not permitted to check out until the beginning hour of the next shift. Anyone who would have clocked out early would have had his wages docked. During the 15 minutes of early relief, the employee performed exactly the same duties as his predecessor and the same as he performed throughout the remainder of his shift. In that case, too, recovery was denied by the District Court, which held that overtime in such circumstances was compensable only by either express contract or by custom or practice. The Court said that the practical situation was simply that the employees wished to ad-

vance each shift by 15 minutes and that they were paid for the eight hours during which they performed their duties, that the requirement that they should not check out before the beginning hour of the next shift was so as to keep the shifts from becoming staggered.

We submit that those decisions are not erroneous; that in following them the District Court did not commit error; and that the Court of Appeals was justified in affirming the judgment.

The same general principle was approved in *E. I. duPont deNemours & Co. v. Harrup*, 227 F.2d 133 (C.A. 4, 1955), and in *Smith v. Cleveland Pneumatic Tool Co.*, 173 F.2d 775 (C.A. 6, 1949), where employees sought recovery for 40 minutes per day constituting a waiting period during which they were required to be present and available for work, and the court denied recovery holding that it was barred by the Portal-to-Portal Act.

THE DECISION IS IN ACCORD WITH SECTION 4 OF THE PORTAL-TO-PORTAL ACT

Petitioners take the position that both the District Court and the Court of Appeals, although claiming that the case was decided under Section 4 of the Portal-to-Portal Act, actually applied the standards of Section 2 of the Act. We recognize the difference in the two Sections but submit that they have a common purpose and that the two Courts in question actually did apply the standards of Section 4 and that they reached a correct result.

On that point, the decision in *Ciemnoczolowski v. Q. O. Ordnance Corporation*, 228 F.2d 929 (C.A. 8, 1955)

is of particular interest. It involved the question of requiring change of clothing and showering as it relates to *Steiner v. Mitchell*, 215 F.2d 171 (C.A. 6, 1954), affirmed 350 U.S. 247, 100 L.Ed. 267, 76 Sup. Ct. 330 (1956). The employees who worked in an ordnance plant on the powder line were required to change into work clothes at the beginning of the shift and again changing and showering at the conclusion of the shift. This was necessary as a safety precaution and required a total of approximately 45 minutes each shift.

The District Court held that the time was not compensable and the judgment was affirmed by the Court of Appeals. The problem is stated at pages 931 and 932:

> "As plaintiffs aptly state in their brief—'The basic issue on this point is whether or not the clothes changing and showering activities were part of the principal activities which these workers were employed to perform.'
>
> "The powder line workers who engaged in melting, pouring and processing explosives were required to change their clothes and take a shower after their shift. They were required to change their clothes as a safety precaution against explosions which might be caused from sparks from metallic objects on or in conventional clothing. They were required to take a shower as a safety measure for the employee's own health to avoid after effects of powder remaining on the person of the employee.
>
> "These plaintiffs contend that because they were required for those reasons to devote this period of time to those purposes, that the time so

devoted was time spent in a necessary part of their principal duties. * * *"

When that case was decided, *Steiner v. Mitchell* had already been decided by the Court of Appeals for the Sixth Circuit, but had not yet reached the Supreme Court, and the Court refused to follow it, saying at page 932:

> "We do not understand however, that the import of Steiner v. Mitchell is that those facts would compel the conclusion that in every case where the changing of clothes was required as a protection to the health of the employees the activity was a part of the principal activity if other cogent facts were present which prevented a finding that the greater weight of the evidence established the hypothesis that the activities in question were principal activities."

It held that whether certain work constituted a part of the principal activities was a question to be determined from the facts in each case, saying at page 933 and 934:

> "We must conclude that the necessity of an activity to the performance of the principal activity will not alone make the former a part of the principal activity.
>
> "Whether a preliminary or postliminary activity, necessary to the performance of the 'principal activity', is an integral part of the principal activity is a question of fact to be determined from all the relevant evidence. * * *"

Thereafter, *Steiner v. Mitchell* was affirmed by the Supreme Court and in the light of that a rehearing was

granted in the *Ciemnoczolowski* case under the style of *Dunning et al. v. Q. O. Ordnance Corp.*, 233 F.2d 902 (C.A. 8, 1956). It was heard by a panel of three Appellate Judges, two of whom were not members of the panel which had decided the case the first time. Again, that court affirmed the decision of the District Court denying recovery to the employees and reaffirmed its original decision. Of particular significance is the fact that certiorari was denied, 352 U.S. 927, 1 L.Ed.2d 162, 77 Sup. Ct. 226 (1956), in spite of the Supreme Court's contemporary ruling in *Steiner v. Mitchell.*

A significant fact is that the *Ciemnoczolowski* case dealt with events which had occurred prior to May 14, 1947, hence came under Section 2 of the Portal-to-Portal Act (29 U.S.C.A. 252), the court deciding that the activities in question were *preliminary* and *postliminary*. *Steiner v. Mitchell* dealt with events subsequent to that time, so that Section 4 of the Portal-to-Portal Act applied (29 U.S.C.A. 254). Inasmuch as the activities in the *Ciemnoczolowski* case were held to be preliminary and postliminary, the fact that they came under different Sections of the Act is immaterial here. Although Section 2 was intended to prevent litigation for acts prior to May 14, 1947, while Section 4 applies to acts after that date, they both have a common purpose; and inasmuch as Section 4 specifically covers preliminary and postliminary acts, which were the subject matter of the *Ciemnoczolowski* case, the case is very much in point here.

Other cases in which recovery was denied in situations where the changing of clothes and showering at the end of the shift was required by the employer are *Hoover v. Wyandotte Chemicals Corp.*, 455 F.2d 387

(C.A. 5, 1972); *Williams v. W. R. Grace & Co.*, 247 F. Supp. 433 (E.D. Tenn. 1965); *Nardone v. General Motors, Inc.*, 207 F. Supp. 336 (N.J. 1962).

REASONS FOR DENYING CERTIORARI

We submit that certiorari should be denied because:

1) The decision is not in conflict with those of other Circuits. To the contrary, it is in accord with decisions of three other Circuits.

2) No broad or important question of law affecting the public interest is involved.

3) The Findings of Facts by the District Court are not clearly erroneous and the decision has been approved by the Court of Appeals for the Fourth Circuit.

4) The decision is in accord with other decisions involving similar facts.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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